UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RICHARD W. FARLEY,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 94-186-B***
	)	
DONNA E. SHALALA,	)	
Secretary of Health	)	
and Human Services,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability appeal raises two issues: whether the Secretary erred in finding that the plaintiff's impairments did not meet or equal any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), and whether the Secretary erred in determining that the plaintiff is capable of performing the full range of sedentary work, which led the Secretary to conclude pursuant to Appendix 2 to Subpart B, 20 C.F.R. § 404 (the "Grid") that the plaintiff is not disabled. The plaintiff contends that the Secretary erred at Step Three of the evaluative process in finding that his impairments do not meet the criteria of Listings 1.05 (disorders

[1] This action is properly brought under 42 U.S.C. § 405(g). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on February 28, 1995 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, cause authority and page references to the administrative record.

of the spine) and 11.04 (central nervous system vascular accident),[2] and that the evidence does not support the Secretary's finding at Step Five as to the plaintiff's residual functional capacity for sedentary work.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since August 26, 1992, Finding 2, Record p. 20; that he suffers from "`severe' limitations associated with a history of a herniated nucleus pulposus, cauda equina syndrome, and neurogenic bladder and bowel,"[3] but that he does not have an impairment or combination of impairments that meets of equals any of the Listings, Finding 3, Record p. 20; that he is unable to perform his past relevant work as a dairy farm worker and woodsman, Finding 7, Record p. 20; that he has a high school education and some semi-skilled work experience, Findings 9-10, Record p. 20; that he has an exertional capacity for the full range of sedentary work, Finding 11, Record p. 21; and that, because he is 39 years old, application of sections 201.28 and 201.29 of the Grid requires a finding that the plaintiff is not disabled, Finding 11, Record p. 21. The Appeals Council declined to review the

[2] The Listing of Impairments, Appendix 1 to Subpart B , 20 C.F.R. § 404, describes physical and mental impairments in terms of specific medical criteria and functional limitations; if an impairment meets the listing requirements, then it is considered to be disabling regardless of age, education or work experience. 20 C.F.R. §§ 404.1520(d) and 404.1525(c).

[3] According to *Taber's Cyclopedic Medical Dictionary* (14th ed., 1981), the cauda equina is the terminal portion of the spinal cord and the roots of the spinal nerves below the first lumbar nerve, *id*. at 251, and the nucleus pulposus is "[t]he center cushioning gelatinous mass lying within an intervertebral disc," *id*. at 970. The plaintiff underwent surgery in August 1992 to correct a "huge extruded disc herniation" that was causing paralysis in the lower half of the body with attendant loss of bladder and bowel function. *See* Record p. 146.

decision, Record pp. 4-5, making it the final determination of the Secretary, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F. 2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 654 F. 2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs*., 647 F.2d 218, 222 (1st Cir. 1981).

The claimant carries the burden of proof at Step Three of the Secretary's evaluative process. 20 C.F.R. § 404.1520(d); *Dudley v. Secretary of Health & Human Servs*., 816 F.2d 792, 793 (1st Cir. 1987). In light of the finding unfavorable to the plaintiff at Step Three, and because the Secretary also determined that the plaintiff is not capable of performing his past relevant work, the burden of proof shifted to the Secretary at Step Five of the evaluative process to show the plaintiff's ability to perform other work in the national economy. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting his ability to perform other work. *Rosado v. Secretary of Health & Human Servs*., 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs*., 794 F.2d 14, 16 (1st Cir. 1986).

The plaintiff first contends that the Secretary erred at Step Three in finding that his impairments do not meet or equal Listing 1.05(C). This listing, concerning "[o]ther vertebrogenic disorders" such as herniated nucleus pulposus and spinal stenosis, requires both (1) "[p]ain, muscle

spasm, and significant limitation of motion in the spine" and (2) "[a]ppropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss." Both (1) and (2) must have persisted for at least three months despite prescribed therapy and must be expected to last at least 12 months. The plaintiff points to the testimony of the medical expert and the record evidence of his examination on May 18, 1993 by Timothy Howe, M.D. As to the latter, Howe's notes provide that

> Dr. Vigna has seen this gentleman in consultation for me. He feels that he may get some strength back, however, the radiculopathy L5, S1 is unlikely to improve, also this the subtle anesthesia S2 to S4 is unlikely to improve. I talked with the gentleman at length regarding this and recommended retraining for a different job.

Record p. 270. It is obvious that Howe's notes do not reflect his own findings as to the plaintiff's prognosis, but are intended to reflect Howe's understanding of the diagnosis made by Bernard Vigna, M.D., the neurologist to whom Howe had referred the plaintiff in 1993. See *id.*, pp. 267-69. Following a diagnosis of cauda equina syndrome, the plaintiff had undergone a laminectomy in August 1992. *See id.*, p. 153. Vigna noted the plaintiff had complained that his medical improvement had leveled off as of the following January. *See id.*, p. 267. According to Vigna, the plaintiff was suffering from chronic radiculopathy and "saddle anesthesia," but the doctor made no finding as to the likely duration of the symptoms beyond noting that he did not "anticipate any further neuronal regeneration." *Id.*, p. 268.

Neither Vigna nor Howe made findings as to the specific symptoms set forth in subparagraphs (1) and (2) of Listing 1.05(C). The medical expert, Edward Babcock, M.D., an internist, testified that the plaintiff had not displayed any of the symptoms set forth in subparagraph (1), and that he no longer had the symptoms described in subparagraph (2). *See id.*, p. 30. On close examination of the record, I agree with the finding of the Administrative Law Judge that none of

the medical evidence in the record demonstrates that the plaintiff's symptoms meet or equal those set forth in Listing 1.05(C).

The plaintiff next contends that the evidence of his cauda equina syndrome required the Secretary to determine that his symptoms meet or equal those in Listing 11.04. In relevant part, this listing requires, more than three months after a vascular accident, "[s]ignificant and persistent disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dexterous movements, or gait and station." According to the plaintiff, as a result of cauda equina syndrome he suffers from such symptoms in both legs. However, the plaintiff points to no medical evidence in the record that requires such a conclusion, and I am unable to find any. Rather, all of the medical evidence supports a determination that the plaintiff's formerly severe condition has significantly improved. In light of the plaintiff's burden at Step Three, I cannot agree that the record compelled the Secretary to conclude that the plaintiff's impairments meet or equal those in Listing 11.04. *See* Social Security Ruling 86-8, reprinted in *West's Social Security Reporting Service*, Rulings at 426-27 (1992) (noting that any such determination must be based on medical evidence).

Finally, the plaintiff contends that the Secretary erred at Step Five in determining that he could perform the full range of sedentary work in light of his testimony that he has difficulty with major motor control in both legs as well as sensory loss and difficulty with urination and bowel movement. The administrative law judge explicitly considered this testimony and found it to be "not entirely credible" in light of the medical evidence and the plaintiff's own description of his activities. *See* Record at p. 18.

The Secretary's regulations define "sedentary work" as work that

> involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is

> defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a). Sedentary work requires a capacity to sit for about six hours and to walk and stand for about two ours out of an eight-hour workday. Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service*, Rulings at 29 (1992).

As the administrative law judge noted, Howe's progress notes report that the plaintiff's bowel and urinary functioning had sufficiently returned by October 1992 to allow the plaintiff to perform these functions without assistance. *See* Record pp. 18, 272. Howe's most recent report, dated January 21, 1994, suggests that the plaintiff would be able to perform desk work, although Howe concludes that it is likely the plaintiff would suffer discomfort from an occupation requiring prolonged sitting. *Id*., p. 292. The plaintiff testified that he can only sit for an hour and a half at a time without experiencing extreme discomfort in the neck area. *Id*., p. 46. In his assessment of the plaintiff's residual functional capacity for work, the medical advisor concluded that the plaintiff is able to walk for an hour and a half and to lift 50 pounds. *Id*. p. 59. Although the medical advisor made no findings as to the plaintiff's ability to sit, the assessment of the plaintiff's residual functional capacity conducted at the state-agency level concludes that he is able to sit (with normal breaks) for "about 6 hours in an 8-hour workday." *Id*., p. 125.

As I noted above, the Secretary has the burden of proof at Step Five to demonstrate that there are jobs in the national economy that the plaintiff can perform. The Grid is designed to enable the Secretary to make this determination in a streamlined manner, without resort to testimony from a vocational expert, in appropriate circumstances. *Ortiz v. Secretary of Health & Human Servs*., 890 F.2d 520, 524 (1st Cir. 1989). A finding that the plaintiff is not disabled pursuant to sections 201.28

and 201.29 of the Grid requires substantial evidence that he is able to perform the full range of sedentary work. In light of the two assessments of the plaintiff's residual functional capacity, I find such substantial evidence in the record considered by the administrative law judge.

Accordingly, I recommend that the Secretary's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 14th day of March, 1995.

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David M. Cohen
United States Magistrate Judge